IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No._____

J. M. PROCTOR, JR., AND ALMOND JAMES JONES,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of the Court Below

The opinion of the Court below has not been officially reported. It is dated December 15th, 1944, and appears at pages 123, 125 of the record. It is attached to this Brief as an exhibit and appears on pages 29-31.

Statement of the Case

This has already been stated in the preceding Petition on pages 2-4, which is here adopted and made a part of this Brief. The facts and issues therein stated will be discussed only to the point thought helpful.

Specifications of Error

I.

The Circuit Court of Appeals erred in *not* holding that if the evidence is sufficient to establish Petitioners parties to the alleged *conspiracy*, and likewise proves them guilty of the substantive offense, Petitioners may not be convicted of *conspiracy* to commit the substantive crimes.

II.

The Circuit Court of Appeals erred in *not* holding that the facts in this cause did *not* fall within the scope of the Mann Act, Title 18, Secs. 397 and 398, U. S. C. A., because there is no legal evidence even tending to show that Petitioners possessed, at the time, and prior to leaving Houston, Texas, any intent to transport two ladies in Interstate Commerce for immoral purposes—the indisputable evidence showing Petitioners left on a business trip.

III.

The Circuit Court of Appeals erred in *not* holding that if Petitioners at the time, and prior to leaving Houston, Texas, possessed no intent to transport two ladies in interstate commerce for immoral purposes, but went on a business trip, Petitioners did not violate the Mann Act, Title 18, Secs. 397, 398, U. S. C. A., irrespective of the commission of alleged immoral conduct, on the part of said ladies during their stay in New Orleans.

IV.

The Circuit Court of Appeals erred in *not* holding that the facts in this cause did not fall within the scope of Title 18, Sec. 88, (conspiracy) U. S. C. A., because all of the

legal evidence demonstrates clearly that there was no agreement or understanding between Petitioners, or anyone else, to transport the two women across the State line for any immoral purpose.

V.

The Circuit Court of Appeals erred in *not* holding that there was no competent and substantial evidence tending to support the verdict—the indisputable evidence being that there was no corrupt agreement or understanding between Petitioners, or anyone else, at the time, and prior to leaving Houston, Texas, to transport two ladies across the State line for any immoral purpose, and that the sole purpose of Petitioners' trip was for a lawful objective wholly outside the scope of the Mann Act.

VI.

The Circuit Court of Appeals erred in *not* holding that the Trial Court's failure to instruct as to proof necessary for conviction under the Mann Act and its failure to charge on circumstantial evidence, constituted fundamental error.

ARGUMENT

Point I.

Prosecution and conviction for the distinct offense of conspiracy, as well as for the crime which was the object of the conspiracy, warrants review by this Court.

Petitioners were indicted for violation of Title 18, Sec. 88 (conspiracy), and Title 18, Secs. 397-398. The gravaman of the charge was (a) that Petitioners conspired to transport two women from Houston, Texas, to New Orleans, Louis-

iana, for immoral purposes; and (b) that Petitioners committed the substantive crime of taking the two women from Texas to Louisiana for the same immoral purposes alleged in the conspiracy counts of the indictment (R. 3-8). In Petitioners' Motion for a New Trial (R. 15-17), which was overruled (R. 18) and assigned as error (Ass. 1, 4, 5, 7, R. 20-21), they challenged the verdict rendered. They contend that since "A conspiracy is not the commission of the crime which it contemplates, and neither violates nor "arises under" the Statute whose violation is its object." (BRAVERMAN v. U. S., 317 U.S. 49), they could not be convicted for the commission of the crime itself, and of conspiracy to commit the same crime.

This is so because there can be no conspiracy where the coöperative action of the accused is an essential element of the substantive offense. Since the sole Government witness (Mrs. Anderson) went voluntarily to New Orleans, Louisiana (67), and in view of the legislative intent to protect this witness under the facts in this record (R. 64-67) cf. GEBARDI v. U. S., 287 U.S. 112—the alleged conspiracy and commission of the substantive crime embraces only the Petitioners.

The indictment (R. 3-8) charged Petitioners with conspiracy to commit the crime denounced in Title 18, Sec. 398, and with the commission of the crime itself. The conspiracy charged was confined to the acts of Petitioners by which the two women were allegedly transported. Petitioners were found guilty (R. 10), and sentenced on the conspiracy counts, and for the commission of the crime itself (R. 11-14).

Petitioners contend that they may not lawfully be convicted of conspiracy to commit a specific offense (Mann Act) and at the same time be convicted of the crime which is the object of the alleged conspiracy.

Since Section 398 (Title 18) makes transportation for immoral purposes a felony, and if relevant proof establishes

the commission of the crime punishable by this criminal statute, quite obviously Petitioners could not be lawfully convicted of conspiracy to effectuate the undertaking prescribed by the Mann Act Statute.

> "Lower Federal Courts have several times decided that, if a crime necessarily involves the mutual coöperation of two persons, and if they have in fact committed the crime, they may not be convicted of a conspiracy to commit it (citing cases). Although the Supreme Court has never actually so decided, it has twice clearly approved the doctrine; and we accept it as settled. United States v. Katz, 271 U.S. 354, 355, 46 S. Ct. 513, 70 L. Ed. 986; Gebardi v. United States, 287 U.S. 112, 122, 53 S. Ct. 35, 77 L. Ed. 206, 84 A.L.R. 370. Therefore, if the conspiracy was confined to the transaction between Zeuli and Steneck by which the books were sold, although both were guilty of the substantive crime, neither was guilty of conspiracy." (U. S. v. ZEULI, (2 Cir.), 137 Fed. (2d) 845, 846—JUSTICE L. HAND.)

The doctrine enunciated in the cited case applies to the case at bar, because the substantive offense with which Petitioners were charged necessarily involved mutual coöperation and could not be committed by one of the Petitioners alone (GEBARDI v. U. S., 287 U.S. 112). Thus, the prosecution being for the distinct offense of conspiracy as well as for the crime which was the object of the conspiracy, conviction on the conspiracy counts was erroneous. With this result, the authorities are in accord. In other words, when the law says "a combination between two persons to effect a particular end shall be called, if the end be effected, by a certain name, it is not lawful for the prosecution to call it by some other name," and when the law says, such an offense—e.g., adultery——shall have a certain punishment, it is not lawful for the prosecution to evade this limitation by indicting the offense as conspiracy. Of course when the of-

fense is not consummated, and the conspiracy is one which by evil means a combination of persons is employed to effectuate, this combination is of itself indictable. And hence, persons combining to induce others to commit bigamy, adultery, incest, or dueling, do not fall within this exception, and may be indicted for conspiracy" (WHARTON'S CRIM. LAW (12th Ed.), Sec. 1604, pp. 1862-63).

The conviction as to conspiracy falls since it is not permissible, in the case at bar, to convict on the distinct offense of conspiracy, as well as for the crime which is the object of the alleged conspiracy.

Point II.

The issue raised by the challenge of no legal evidence of "conspiracy" and "unlawful transportation" warrants review by this Court.

The pertinent portions of the statutes for the purpose of this inquiry are as follows:

> " 88. CONSPIRACY TO COMMIT OFFENSE AGAINST UNITED STATES.
>
> If two or more persons conspire either to commit any offense against the United States * * * and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000.00 or imprisoned not more than two years, or both."
>
> "397. WHITE-SLAVE TRAFFIC: TERMS DEFINED.
>
> The term 'interstate commerce,' as used in this section and Sections 398 to 404 of this title, shall include transportation from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia."

"398. TRANSPORTATION OF WOMAN OR GIRL FOR IMMORAL PURPOSES * * *

> Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate commerce * * * , any woman or girl for the purpose of prostitution or debauchery, * * * shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the Court."

We believe that the circumstances in this case justifies review of the lower Court's decision because of the nonexistence of relevant proof to legally establish either conspiracy or the crime itself (ABRAMS v. U. S., 250 U.S. 616; MORTENSEN v. U. S., 322 U.S. 369). The Government relied on but one witness to establish the charge of "conspiracy" and "unlawful transportation." This witness expressly stated that she went to New Orleans, Louisiana, with Petitioners of her own accord, and without any inducement or persuasion exercised upon her. She further states that she had been intimate with Petitioner Proctor, for some time, in Houston, Texas, before making this journey (R. 64). There is no testimony whatever either from this witness, or from any other witness, that Petitioners agreed between themselves, or with anyone else, that the journey was being made pursuant to an unlawful design or purpose, contrary to any Federal Statute. In effect, the evidence relating to the purpose of the trip, from the very beginning, shows quite clearly that Petitioner Proctor went from Houston, Texas, to New Orleans, Louisiana, in furtherance of his employer's business (R. 87-88), and Jones went to secure a job with a Radio Station in New Orleans, Louisiana (R. 31). The naked facts in this

record show the simple situation of a trip being undertaken for legitimate purposes, and no evidence whatever that the journey was planned with an immoral purpose at the time it was initiated, and no relevant proof from any witness that the intention of Petitioners at the time the journey was begun, or during its course, was to transport these women for immoral purposes. The gist of the offense of "conspiracy" is an agreement between the conspirators to commit an unlawful act (DIRECT SALES Co. v. U. S., 319 U.S. 703; FALCONE v. U. S., 311 U.S. 205; BRAVERMAN v. U. S., 317 U.S. 49; MORRISON v. U. S., 291 U.S. 82, and U. S. v. ANDOLSCHEK, ET AL., (2 Cir.), 142 Fed. (2d) 503, 507). The agreement, as well as the other elements constituting conspiracy, may be established by circumstantial evidence (KASSIN v. U. S., (5 Cir.), 87 Fed. (2d) 183, 184). If reliance is placed upon circumstantial evidence to convict, these circumstances must be established to show a legitimate inference of the existence of an unlawful act and participation in an agreement by all parties to the conspiracy, with guilty knowledge on the part of each. "This proof may be circumstantial or direct, or both, but it must be proof. That is, the evidence must have a legitimate tendency to compel belief in a finding of Defendants' guilt. It may not consist merely of circumstances having such remote relation to the fact to be proved as they have not a probable, but only a possible, relevancy" (KASSIN v. U. S. (5 Cir.), 87 Fed. (2d) 183, 184-185).

The Government sought to substitute for the inducement and transportation, which constitutes the offense under Section 398, Title 18, U. S. C. A., illicit sexual relations between Mrs. Anderson and Petitioner Proctor. Petitioner Proctor admits possession of Mrs. Anderson during the period that they were in New Orleans, but the record is barren of any statement that the purpose of the trip was to accomplish that desire. She admits entertaining Proctor long before this trip was made (R. 63).

In ALPERT v. U. S. (2 Cir.), 12 F. (2d) 352, the court said:

> "The journey from one State to another if followed by illicit intercourse does not result in violating the act where the journey was made for a wholly different reason."

In FISHER v. U. S. (4 Cir.), 266 F. 667, the Court said:

> "The transportation in interstate commerce must have for its object, or be the means of effecting or at least facilitating the sexual intercourse of the parties. If the journey was for other reasons to which intercourse was not related the transportation and eventual sexual intercourse cannot be regarded as a violation of the White Slave Act."

In SHAMA v. U. S. (8 Cir.), 94 F. (2d) 1, it is held that the immoral purpose first conceived at the end of a journey is not sufficient under Section 398 of Title 18, U. S. C. A., to constitute a crime.

The paucity of evidence in this case against Petitioners tends strongly to confirm the view that it was initiated out of private enmity. While in New Orleans, Louisiana, and shortly before the parties returned to Houston, Texas, witness Anderson had an altercation with Petitioner Proctor, resulting in witness Anderson stating to Proctor "I will get even with you if it is the last thing I ever do, I will get even with you." Further, "she said she (Mrs. Anderson) made one guy marry her and she would make me (Proctor) marry her too." (R. 95-96.)

As to the substantive charges, there is no evidence whatever pertaining to Petitioners' purpose in making the trip which in any manner makes it as coming within the purview of the Mann Act. Petitioner Proctor stated that the sole purpose for this journey was to check up on some accounts lo-

cated in New Orleans, Louisiana, for Associates Investment Company, of which he was an employee (R. 90). This testimony is confirmed, and is not disputed, by his employer, A. D. Lindquist, who stated that he sent Proctor to New Orleans, Louisiana, for the purpose of handling some delinquent accounts of persons residing in New Orleans, Louisiana (R. 87-88).

There is not the slightest bit of evidence from any witness in this case that Petitioners either committed, or engineered any act to facilitate conduct condemned by the Statute. The burden rests upon the Government to show that the purpose of this trip was such as to fall within the condemnation of this Statute (MORTENSEN v. U. S., 322 U.S. 369). Congress in enacting this Statute, was concerned only in eliminating the transportation of persons engaged in illicit acts and conduct, as well as abolishing incidents thereto, and in preventing women from engaging in unlawful conduct against their will and desire. And in order to establish a conviction under the Mann Act,

> " * * * it is essential that the interstate transportation have for its object or be the means of effecting or facilitating the proscribed activities. Hansen v. Hall, 291 U. S. 559, 563, 54 S. Ct. 494, 495, 78 L. Ed. 968. An intention that the women or girls shall engage in the conduct outlawed by Section 2 must be found to exist before the conclusion of the interstate journey and must be the dominant motive of such interstate movement. And the transportation must be designed to bring about such result. Without that necessary intention and motivation, immoral conduct during or following the journey is insufficient to subject the transporter to the penalties of the Act" (MORTENSEN v. U. S., 322 U.S. 369).

The law on these subjects is unusually clear and free of

doubt. As to the conspiracy counts, recent applications may be found in GEBARDI, ET AL., v. U. S., 287 U.S. 112; MORRISON v. CALIF., 291 U.S. 82; U. S. v. FALCONE, 311 U.S. 205; DIRECT SALES CO., INC., v. U. S., 319 U.S. 703; YOUNG, ET AL., v. U. S., 48 F. (2d) 26 and KASSIN v. U. S., 87 F. (2d) 183.

As to the substantive counts, recent applications may be found in MORTENSEN v. U. S., 322 U.S. 369; YODER v. U. S., 80 F. (2d) 665; HUNTER v. U. S. (4 Cir.), 45 F. (2d) 55 and SLOAN v. U. S., 287 F. 91.

That this case falls within the rule, both as to the conspiracy counts and as to the substantive crimes, follows from a fair and impartial scrutiny of all of the testimony. No proper inference of guilt is, therefore, permissible.

Point III

The refusal of the Circuit Court of Appeals for the Fifth Circuit to follow decisions in other circuits on the necessity for the jury being properly instructed on the law applicable to this case requires review by this Court.

The Circuit Court in the case at bar refused to follow the Fifth Circuit's decisions in ANDERSON v. U. S., 302 F. (2d) 485, 487; and HUNTER v. U. S., 52 F. (2d) 217, 220, and those of the First Circuit in MALAGA v. U. S., 57 F. (2d) 822, and of the United States Court of Appeals for the District of Columbia in WILLIAMS v. U. S., 131 F. (2d) 121, 122-23. The Government's case rested solely on circumstantial evidence. There was no evidence whatever connecting Petitioner Jones and Doris Andrews (she was married to Petitioner Jones, and is still married, before the trial of this cause R. 78, 105), with any intent to convey Mrs. Anderson to

Louisiana for immoral purposes, or with a conspiracy to do anything proscribed by the Mann Act. Thus, the request for instructions on the law of circumstantial evidence prior to the case being submitted to the jury (R. 116-117) was appropriate. The Trial Court seemed to be of the impression that Petitioners would have to admit that a crime had been committed before he could advise the jury as to the law on circumstantial evidence (R. 117).

The colloquoy between the Court and the attorneys representing Petitioners, on this score, is reproduced in full.

"Mr. Smith:

Defendant Jones requests a charge on circumstantial evidence with reference to any prostitution on the part of Doris Andrews.

The Court:

Gentlemen of the Jury, you can infer or deduct or reason that from certain facts other facts are arrived at, and of course if you do go into the question of circumstantial evidence, you must find that by the same formula that I have given you with reference to reasonable doubt.

Mr. Smith:

No, sir, I think we are entitled to a charge on the law of circumstantial evidence with reference to any prostitution on the part of Doris Andrews, your Honor. I think we are entitled to a charge on circumstantial evidence.

The Court:

Well, in the Federal Courts, gentlemen, the Court is permitted to charge on the weight of the evidence and even go so far as to give his idea as to the guilt or innocence of the defendants. I have never made a practice of that and I won't do it now unless you want me to.

Mr. Smith:

Well, your Honor, the Court probably misunderstood

me. I just thought we were entitled to a charge on that phase of what circumstantial evidence is, that is all I wanted.

The Court:

Well, I have told them as much as I want to on that fact.

Mr. Smith:

Doesn't the Court further think that we are entitled to a charge—I know they don't have to be corroborated but I believe in law and in fact Eleanor Anderson is an accomplice.

The Court:

You will have to admit there has been a crime committed then.

Mr. Smith:

No, sir, I don't; she (the Government witness—Mrs. Anderson) is the one who said there was; I don't admit anything" (R. 116-117).

The Trial Court instead of instructing the jury as requested by counsel, to advise the jury as to circumstantial evidence, suggested to the jury that it use the Court's previous vague formula also in determining reasonable doubt, and then refused, when counsel suggested that such instruction was insufficient to advise the jury any further as to circumstantial evidence. This, we submit constitutes basic error. Such refusal tended to impose upon Petitioners the burden of establishing themselves innocent by showing that they had made no unlawful agreement, in violation of the Mann Act before journeying to Louisiana. And the effect of the charge given in this case was probably that unless Petitioners affirmatively established that fact, the jury could find that they had entered into such an unlawful enterprise, and were thus guilty. In refusing the requested instruction suggested by Petitioners' counsel, the Trial Court took from the jury the issue of fact

as to what was the purpose and intention of Petitioners, whether in journeying to New Orleans, Louisiana, they had the immoral purpose proscribed by the Mann Act as an element of the substantive crime. This requested charge should have been given because it is too well established for citation of authorities that the burden rested upon the Government to show that both Petitioners co-operated in carrying out the conspiracy charged.

The vice in the Court's charge is contained in the admonition to the jury that it could determine "who told the truth, whether they told the truth completely, or whether they told half the truth, whether part of the testimony is to be believed, whether any part of it is to be believed, or whether the testimony in toto is to be believed" (R. 114).

We submit that this charge does not conform to the law applicable in this type of case. The instruction dealing with "credibility" and "reasonable doubt" in the main, is correct, but the admonition quoted presents a conflict which was not cured by any further instruction by the Court. And such instruction as quoted herein, is erroneous because it is utterly impossible to determine which of the instructions the jury followed. (YODER v. U. S. (10 Cir.), 71 Fed. (2d) 85.)

The charge given by the Trial Judge in this case, assumes that the jury was as eminently qualified in the law as the Trial Judge. The Trial Court omitted to state the essential features of conspiracy; did not embrace the distinction between Petitioner Proctor's possession of Mrs. Anderson prior to the journey to Louisiana, and the basic elements required to determine whether intent to commit an unlawful act prevailed at the outset, or during the course, of the journey. And it is not safe to assume that the average juror possesses knowledge of the elements which go to make up the statutory offenses charged. (WILLIAMS v. U. S. (U.S. Ct. of App., D.C.), 131 F. (2d) 21.)

Since the Court charged in effect that witness Lindquist's testimony as to the purpose of the trip could be disregarded, as well as Petitioner Proctor's testimony, the conviction by the jury followed automatically. Petitioners challenged the failure to properly charge the jury in their Motion for a New Trial (R. 15-17), which was overruled (R. 18), and preserved by assignments 1 and 2 (R. 20).

The Trial Court's attention was particularly directed to counsel's desire to have the jury instructed as to the law on circumstantial evidence. Such request does not seem to have been improper, because Petitioner Jones and his wife (formerly Doris Andrews) were not in any manner shown to have directly or indirectly conspired to violate the Mann Act Statute, or to have known that such conspiracy existed. Nor did the evidence involve either, or both, of these named persons, on the sole material and relevant issue—was the trip conceived solely for purposes in violation of the Mann Act. Since the evidence presented an issue based upon circumstances, and the Court's attention having been directed to this fact, it was reversible error for the Trial Court to refuse such charge. (BIRD v. U. S., 180 U.S. 356, 361; CALDERON v. U. S. (5 Cir.), 279 F. 556, and YODER v. U. S. (10 Cir.), 71 F. (2d) 85.) The YODER case, supra, involved a prosecution similar to the case at bar. The Tenth Circuit Court in passing upon a charge somewhat similar to that given in the case at bar, said:

> "The Court more than once told the jury in its instructions that they could believe such testimony as they desired to believe, or ignore it; that it was entirely up to them. It used that language in commenting on the testimony of the four witnesses of Defendant as to conversations between Mrs. Young and Defendant in the garage. It also used that language broadly as to all of the witnesses. That is not the law. It is the duty of

> the jury, and it ought to be instructed that it should consider dispassionately and fairly the testimony of each and all the witnesses, and that they cannot arbitrarily ignore the testimony of any witness unless they believe he knowingly and willfully testified falsely * * * " (p. 89).

Trials in the United States Courts require that atmosphere shall not displace competent evidence and that passion and prejudice will not block efforts to ascertain the truth. (U. S. v. KRULEWITCH (2 Cir.), 145 F. (2d) 76, 80.) The Trial Court in refusing to charge on circumstantial evidence avoided a fundamental duty, under the nature of the record in this cause, and thereby destroyed a valuable right which has been hitherto jealously guarded. A charge on circumstantial evidence, as requested, should have been given because the testimony of Mrs. Anderson (R. 61-79) discloses that her utterances were inspired by a venomous hatred and were born of a feeling of vengeance (R. 95-96). True, this reaches the question of credibility, and credibility is a matter for the jury. But the very nature of this witness' testimony ought to have put the Court on guard lest Petitioners' right be invaded and the quest for the ascertainment of truth be stultified. For it is all too true that cases of this kind frequently breed ugly characterizations, and the naked truth is thus lost in a labyrinth of prejudice. From such a surrounding, suspicion is frequently substituted for competent evidence.

We believe another reason exists in this record which justifies the Court instructing on circumstantial evidence. That Petitioners were tried with a malicious zeal and, at times, with little regard for the heavy responsibilities resting upon a prosecuting attorney (cf. BERGER v. U. S., 295 U.S. 78, 88;

REPORT TO THE NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT ON "UNFAIRNESS IN PROSECUTIONS," p. 286) seems quite apparent from a reading of the record (R. 50-60, 79-84, 100, 103). The following references give some idea of the inexcusably unfair note struck by the prosecuting attorney. In questioning Petitioner Proctor who had been indicted for conspiracy to violate the Mann Act Statute, and for an alleged violation of the Statute itself, the prosecutor insinuated that Proctor had worked at various jobs, including that of a "bouncer" at a night club in Houston, Texas, where a floor show included "strip teasers." The Court approved the question as well as the answer (R. 101). This innuendo that Petitioner Proctor had been so engaged was but a vicious attempt to impress the jury with the existence of wrong-doing by Proctor in accompanying the young ladies from Houston, Texas, to New Orleans, Louisiana. In another instance, the prosecutor insinuated that Proctor was of a contemptuous type by endeavoring to get Proctor to admit that he had told an F. B. I. agent that he had had an altercation with a Deputy Sheriff (R. 99). Although this insinuation was to some extent removed, the probable effect of such an insinuation could not but leave a deep impression upon the jurors against Proctor.

Still another instance, the prosecutor insinuated that Petitioner Proctor, together with McCutcheon (who was not indicted nor called as a witness) asked two young girls whom they had met on the street in New Orleans, Louisiana, to engage in immoral acts (R. 103). There was no evidence that Petitioner Jones was present, and no evidence that these young ladies were molested in any manner; in fact the young ladies testified that they were in no manner disturbed (R. 50-59, 79-84).

These false and unfounded insinuations were utterly immaterial to the issues of the case and could have been justi-

fied only by the desire to focus the attention of the jury on matters not at all connected with the specific charges. The irrelevancy of the insinuations and innuendoes merely emphasize the length to which the prosecutor proceeded in order to convince the jury that past acts (even if true) for which Petitioners were not on trial, probably connected them with violations with which they were charged. (In BOYD v. U. S., 142 U.S. 450, Harlan, J., stated "that whatever may have been the character of the Defendants, however full of crime their past lives may have been, the Defendants were entitled to be tried upon competent evidence and only for the offense charged.") Analysis fails to show how any of these matters could have possibly related to a conspiracy to transport two ladies from Texas to New Orleans, Louisiana, and whether an intent to violate the substance of the Mann Act existed.

Since the Trial Court charged in effect that witness Lindquist's testimony (R. 84-87) as well as Petitioner Proctor's testimony (R. 88-104) could be wholly disregarded (R. 114), conviction by the jury followed.

The Circuit Court of Appeals held "When the evidence is measured to the definition of conspiracy and to the substantive offenses charged in the two additional counts, it becomes manifest that the jury was warranted in finding the Defendants guilty as charged on all three counts of the indictment." It expressed no opinion on the correctness of the charge of the Trial Court.

Under this point (Point III) the Court below erred in two respects:

(1) The charge to the jury was fundamentally erroneous in that it destroyed a valuable right enuring to Petitioners, and,

(2) Even if the evidence was sufficient to go to the jury, the judgment should be reversed because of the tactics of the the prosecuting attorney and the Trial Court's seemingly

misconception of the law which undoubtedly created basic confusion in the minds of the jurors as to the charges for which Petitioners were being tried. Absence of an exception may be disregarded here as under similar circumstances it was disregarded in CRAWFORD v. U. S., 29 S. Ct. 260, 264; WIBORG v. U. S., 16 S. Ct. 1127, 1137; U. S. v. MURDOCK, 290 U.S. 389; and LAMENTO v. U. S. (8 Cir.), 4 F. (2d) 901.

Only by the device of ignoring completely the indisputable evidence of witness Lindquist and of Petitioner Proctor, as to the sole purpose in making this journey, and substituting an arbitrary intention nowhere disclosed in this record, can these convictions stand. The march to the penitentiary of these two young men should not be hastened, under the recorded facts. And these facts would seem to show that the Federal Authorities had entered into a domain not provided for by Statute, but resting solely with the State authorities.

The plain and fundamental error recited herein has resulted in these young men being convicted as felons and given heavy prison sentences. Since the quest here is not to solve the manifest vagaries of mankind, nor to determine private views concerning morality (HOLMES, COLLECTED LEGAL PAPERS, pp. 171-172), but to calmly evaluate the evidence in the record, the sole issue here is whether convictions bottomed upon a wholly erroneous legal concept and a complete lack of competent evidence may survive.

For the reasons before stated, Petitioners earnestly urge that this Court grant its Writ of Certiorari directed to the Court of Civil Appeals for the Fifth Circuit and relieve these Petitioners from the unjust burden to which they are subjected by the terms of the Judgment entered against them by said Court.

Conclusion

It is respectfully submitted that the Writ of Certiorari prayed for in the Petition should issue.

Respectfully submitted,

BERNARD A. GOLDING,
432 Niels Esperson Building,
Houston, Texas,
Counsel for Petitioners

EXHIBIT A

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
For the Fifth Circuit

No. 11004

J. M. PROCTOR, JR., and ALMOND JAMES JONES,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee

Appeal from the District Court of the United States for the Southern District of Texas

(December 15, 1944)

Before SIBLEY, HOLMES, and McCORD,
Circuit Judges.

McCORD, Circuit Judge: J. M. Proctor, Jr., and Almond James Jones were indicted jointly on three counts, the charge being (1) conspiracy to transport or cause to be transported in interstate commerce two females from Houston, Texas, to New Orleans, Louisiana; (2) and (3) substantive offenses in violation of Section 2 of the Mann Act in that they transported or caused to be transported two girls from Houston, Texas, to New Orleans, Louisiana, for the purpose of prostitution and debauchery.

Proctor and Jones were both convicted on all three counts of the indictment. Thereupon they were sentenced under the conspiracy count to serve a term of two years imprisonment, and on the other two counts two years imprisonment on each count, the sentences as to these two counts to run concurrently; the sentence imposed on counts two and three

were suspended for the term of five years, conditioned upon defendants' good behavior.

The two defendants gave statements to an officer which, when considered with the other evidence, point unerringly to their guilt of transporting the two females in question to New Orleans for immoral purposes. They met in Houston, Texas, and planned and agreed to go to New Orleans in the automobile of J. M. Proctor, Jr., and they were accompanied on the trip by a third man who was not indicted. The party of five traveled all night, each of the three men taking turns at the wheel. One of the girls testified that she knew they were going to New Orleans for immoral purposes. The party arrived in New Orleans on the next day, and about 1 o'clock in the afternoon registered at a hotel, Proctor and one of the girls registering as man and wife, Jones and the other girl also registering as man and wife. They spent four days and four nights in New Orleans and while there the evidence further shows that both girls filled dates and practiced prostitution, the dates being made by bell boys and at the instance of the defendants; the defendants invited two other young girls to come to their rooms and an altercation arose between the girls and the house detective of the hotel entered one of their rooms to quell and settle the disturbance; at about 2 o'clock in the morning, and after the altercation between the girls, the entire party left the hotel, and Proctor left without claiming his baggage or paying his hotel bill. One of the girls was paid about the sum of $34.00 for practicing prostitution and she gave this money to Proctor, and when they arrived back in Houston he gave her $1.00.

When the evidence is measured to the definition of conspiracy and to the substantive offenses charged in the two additional counts, it becomes manifest that the jury was warranted in finding the defendants guilty as charged on all

three counts of the indictment. 18 U. S. C. A., Sec. 88, p. 125; 18 U. S. C. A., Sec. 398, p. 249; *Braverman v. United States*, 317 U.S. 49, 53; *Direct Sales Company v. United States*, 319 U.S. 703; *Shama v. United States*, 94 F. (2d) 1; *United States v. Reginelli*, 133 F. (2d) 595; *Brent v. United States*, 131 F. (2d) 861.

We find no reversible error in the record and the judgments are

AFFIRMED

A True Copy:
Teste:
(SEAL)

OAKLEY F. DODD
Clerk of the United States Circuit Court of
Appeals for the Fifth Circuit